

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VANESSA RIVERA,

Plaintiff,

-against-

NOT FOR PUBLICATION

THE STATE OF NEW YORK; THE CITY OF
NEW YORK; NYC HEALTH AND
HOSPITALS CORPORATION; DANIEL M.
DONOVAN, JR., IN HIS OFFICIAL
CAPACITY AS RICHMOND COUNTY
DISTRICT ATTORNEY, BAYLEY SETON
HOSPITAL; NEW YORK LAWYERS FOR
THE PUBLIC INTEREST, INC.; and
BATTISTE, ARONOWSKI, AND SUCHOW,
INC.

Defendants.

MEMORANDUM AND ORDER
14-CV-7160 (PKC) (LB)

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PAMELA K. CHEN, United States District Judge:

On December 4, 2014, Jesus Berrios, the purported uncle of plaintiff Vanessa Rivera, filed this action alleging that defendants violated State and federal laws in the care, assessment, treatment and prosecution of Ms. Rivera. Plaintiff seeks declaratory and injunctive relief as well as damages. Plaintiff also requests *pro bono* counsel. Mr. Berrios, who is not an attorney, seeks to be appointed the guardian *ad litem* of Ms. Rivera. The Court grants plaintiff's request to proceed *in forma pauperis* solely for the purpose of this Order. For the reasons set forth below, Mr. Berrios's application to be appointed Ms. Rivera's *guardian ad litem* and request for *pro bono* counsel are denied. The Court also directs Ms. Rivera to file an Amended Complaint

within thirty (30) days of the date of this Order to affirm that she wishes to proceed in this action in her own right. If Ms. Rivera fails to file an Amended Complaint within thirty (30) days, this case will be dismissed for failure to prosecute.

Background

This complaint is a duplicate of the one filed by Mr. Berrios in *Berrios v. The State of New York, et al.*, No. 10-CV-2897 (E.D.N.Y. Feb. 17, 2011), *appeal dismissed*, Mandate, No. 11-1020 (2d Cir. June 17, 2011).¹ There, the Honorable Raymond Dearie denied Mr. Berrios's application to be appointed Ms. Rivera's guardian *ad litem* and for *pro bono* counsel. *Berrios*, No. 10-CV-2897 (E.D.N.Y. Feb. 17, 2011). Judge Dearie did not consider the merits of Ms. Rivera's claims, because "the Court may not consider . . . any claims that Ms. Rivera, an alleged incompetent person, may have." *Id.* at 2.

The only difference now is that Mr. Berrios does not appear in the caption of this complaint as Ms. Rivera's guardian; instead, this action is purportedly filed and signed by Ms. Rivera. The allegations, however, are identical to those brought in *Berrios*, No. 10-CV-2897. And despite the amended caption and Ms. Rivera's signature, the complaint makes references to "Plaintiff Jesus Berrios" as the party bringing the action. *See* Compl. at 2, ¶ 4.

This is Mr. Berrios's third attempt to file on behalf of Ms. Rivera in federal court. His past two attempts have all been unsuccessful. *See Berrios v. The State of New York, et al.*, No.

¹ Mr. Berrios is no stranger to this Court or the State courts. *See In the Matter of Vanessa R.*, 59 A.D.3d 726, 873 N.Y.S.2d 491 (2d Dep't 2009), *leave to appeal dismissed*, 12 N.Y.3d 872, 882 N.Y.S.2d 680 (2009); *Berrios v. Apfel*, No. 00-CV-4278 (E.D.N.Y. Aug. 24, 2001); *Abreu, Luisa et al. v. State of New York, et al.*, No. 02-CV-1618 (E.D.N.Y. Mar. 21, 2002), *appeal dismissed*, Mandate, No. 02-7448 (2d Cir. Oct. 11, 2002); *Berrios v. New York City Housing Authority*, 564 F.3d 130 (2d Cir. 2009).

09-CV-2236 (E.D.N.Y. July 27, 2009) (denying Berrios's and his nephew Christopher Rivera's requests for pro bono counsel and to be appointed Ms. Rivera's representatives without considering the merits of Ms. Rivera's claims), *appeal dismissed*, Mandate, No. 09-3779 (2d Cir. Jan. 27, 2010); *Berrios v. The State of New York, et al.*, No. 10-CV-2897 (E.D.N.Y. Feb. 14, 2011) (denying Berrios's applications for pro bono counsel and to be appointed Ms. Rivera's guardian *ad litem* without considering Ms. Rivera's claims), *appeal dismissed*, Mandate, No. 11-1020 (2d Cir. June 17, 2011). It is unclear why Mr. Berrios now attempts to bring this action again. There are no new allegations since the complaint was filed in Docket No. 10-CV-2897; the complaint here is, in fact, identical to that submission.

The Court reiterates that when the owner of a claim is a minor or incompetent person, unless that claimant is properly represented by a guardian *ad litem* or other suitable fiduciary, *and* that representative either is, or is represented by an attorney, the district court should not issue a ruling as to whether the complaint states a claim on which relief may be granted. *Berrios v. New York City Housing Authority*, 564 F.3d 130, 134 (2d Cir. 2009).

Here, Mr. Berrios alleges that Ms. Rivera is incompetent, but the instant record does not support his claim. An unmarked exhibit included in the submission states that Ms. Rivera "has a mild level of intellectual disability." *See* Compl., Unmarked Exhibit, Social Service Annual Summary dated May 16, 2013. Moreover, the State court has previously denied Mr. Berrios's request to be appointed Ms. Rivera's guardian *ad litem*. *See In the Matter of Vanessa R.*, 59 A.D.3d 726, 873 N.Y.S.2d 491 (2d Dep't 2009), *leave to appeal dismissed*, 12 N.Y.3d 872, 882 N.Y.S.2d 680 (2009).

Conclusion

Accordingly, the Court does not consider and offers no opinion on any claims that Ms. Rivera may have. Mr. Berrios's application to be appointed Ms. Rivera's guardian *ad litem* is denied. Likewise, the request for *pro bono* counsel is denied without prejudice.

Based on the appearance of Ms. Rivera's name in the complaint caption, the Court directs Ms. Rivera to file an Amended Complaint within thirty (30) days of the date of this Order.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of any appeal. *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

/s/ Pamela K. Chen

Pamela K. Chen
United States District Judge

Dated: Brooklyn, New York
February 10, 2015